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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Promotion of Competitive Networks in	)	
Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed To	)	
Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

REPLY COMMENTS OF TELIGENT, INC. IN RESPONSE TO THE COMMISSION'S NOTICE OF INQUIRY

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December 13, 1999

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REPLY COMMENTS OF TELIGENT, INC. IN RESPONSE TO THE COMMISSION'S NOTICE OF INQUIRY

Teligent, Inc. ("Teligent") hereby submits its reply comments in response to the Notice of Inquiry in the above-captioned proceeding.[1]

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[1] Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217

The comments submitted in this proceeding reflect a general agreement among carriers of all types -- incumbents and new entrants alike -- that telecommunications carriers should not be subject to municipal fees or requirements that are unrelated to a local government's reasonable regulation of the public right-of-way.[2] Carriers have provided the Commission with numerous examples of local governments exceeding their legitimate authority to manage the public rights-of-way.[3] Like Teligent, a substantial number of commenters have urged the Commission to use this proceeding to prohibit municipalities from regulating telecommunications carriers in a manner that exceeds legitimate and reasonable public right-of-way management.[4] A comprehensive federal approach to the proper interpretation of Section 253(c) is necessary given the substantial number of municipal governments and the real harm to the development of local exchange competition that results from improper and inconsistent interpretations of the statute. A failure of the Commission to act based on the evidence received in this proceeding will permit the imposition of greater expense on the construction of competitive telecommunications networks to

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and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 (rel. July 7, 1999)("Notice").

2 See, e.g., Comments of AirTouch at 12; ALTS at 6; AT&T at 8, 18; BellSouth at 3, 7; Cox at 27; Florida Telecommunications Industry Association at 8; GTE at 2; MediaOne at 3, 7-8; and Sprint at 3.

3 See, e.g., Comments of ALTS, *passim*; AT&T at 9-14; Cablevision Lightpath and NEXTLINK Communications at 9-14; Level 3 Communications at 6-8; McLeodUSA at 2-6; and SBC Communications at 6-8.

4 See, e.g., Comments of AirTouch Communications at 12; Cablevision Lightpath & Nextlink Communications at 4; Cox Communications at 15-16; CTSI at 14; Florida Telecommunications Industry Association at 8; Global Crossing at 9-10; GST Telecom at 20; GTE at 3; Level 3 Communications at 18; MediaOne at 7-8; National Cable Television Association at 4; and RCN Telecom at 7-8.

continue and expand, and will condone the unreasonable barriers to entry and impediments to lower cost services that are improperly erected by local government authorities.

The local government comments filed in this proceeding convey a tone of hands off, *i.e.*, that public right-of-way management is none of the FCC's business. Teligent and others recognize the need for local government control of public right-of-way management, but that control is not as absolute as the local governments would have the Commission believe. Through the Telecommunications Act of 1996, Congress inserted a federal interest into the manner in which public rights-of-way are regulated in spite of the good deal of autonomy which remains with local governments. In Section 253(c) of the Act, Congress limited the breadth of that autonomy to local government management of the public rights-of-way. This "management" authority does *not* extend to the regulation of telecommunications carriers generally.[5] Unless otherwise validly delegated, the authority for regulating telecommunications carriers lies at the federal and State levels of government.[6] Consequently, local governments may not impose requirements that exceed the scope of legitimate right-of-way management authority, such as the requirement that carriers produce extensive financial information or provide free or in-kind services to the municipality.[7] Moreover, in exercising their legitimate role, local governments

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5 ALTS properly explains that "[m]unicipal regulation of use of the rights-of-way is limited to reasonable regulation of the time, place and manner of construction of facilities. This would not include such things as regulation of services, information requirements that are unrelated to the scope of the proposed construction, or any interconnection requirements." Comments of ALTS at 26.

6 47 U.S.C. § 152.

7 See, e.g., AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F.Supp.2d 582, 593 (N.D. Tex. 1998); see also BellSouth Telecommunications, Inc. v. City of Coral Springs, Florida, 42 F.Supp.2d 1304, 1309-1311 (S.D. Fla. 1999).

must manage the public rights-of-way in a competitively neutral and nondiscriminatory manner.[8] Hence, they cannot impose obligations or fees on new entrants that are not imposed on incumbent carriers.

Because municipal authority ends with the public rights-of-way, the local government has no authority over a carrier -- such as a fixed wireless carrier or a reseller -- that does not use the public rights-of-way. Other commenters overwhelmingly agree. AirTouch notes that "[w]ireless and other carriers generally do not use rights-of-way for their own facilities."[9] Similarly, AT&T explains that "[a] city's authority under Section 253(c) does not reach other carriers that do not burden a city's rights-of-way, such as wireless carriers, resellers, carriers providing service through unbundled network elements purchased from other carriers, and carriers that lease conduit or dark fiber or attach their facilities to the poles of others."[10] CTSI states that "the courts have concluded that 'use' of the public rights-of-way for purposes of triggering a local jurisdiction's right to compensation under Section 253(c) is limited to physical occupation of the rights-of-way, as occurs when facilities are installed, and does not encompass a provider's transmission of data through facilities owned by another."[11] In sum, the first and in many cases the sole inquiry as to a municipality's legitimate authority over a carrier must be whether the telecommunications carrier physically occupies the public right-of-way. If the carrier does not occupy the public right-of-way, the municipality lacks authority over the carrier.

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8 47 U.S.C. § 253(c).

9 Comments of AirTouch Communications at 5.

10 Comments of AT&T Corp. at 8.

11 Comments of CTSI at 7-8.

Local government commenters seek to justify their burdensome requirements by asserting that evidence of the development of local competition proves that local requirements do not burden carriers and their customers.[12] The logic of this position is flawed. Local competition has developed *in spite of* burdensome local government requirements. Moreover, unauthorized municipal regulations and fees limit the full achievement of the goals of the 1996 Telecommunications Act. The local government commenters would be hard pressed to demonstrate that local competition would not be developing at a *faster* rate and with *greater* consumer benefits absent burdensome and unauthorized local requirements. Finally, barriers to the development of competition warrant Commission action long before they completely eliminate all competitive growth. Indeed, historically the Commission has recognized the need for action prior to the imposition of severe damage to the public interest.

> Our responsibilities are not discharged . . . by withholding action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled - i.e., by waiting 'until the bodies pile up' before conceding that a problem exists. Our duty is 'to encourage the larger and more effective use of radio in the public interest' - ensure that all the people of the United States have the maximum feasible opportunity to enjoy the benefits of broadcasting service. To accomplish this goal, we must plan in advance of foreseeable events, instead of waiting to react to them.[13]

That being said, the barriers to competitive entry presented by excessive local government regulations are not merely phantom barriers. They actually increase carriers' costs significantly

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12 See, e.g., Comments of Colorado Municipal League, et al. at 10-11; National Association of Counties at 3; National League of Cities, et al. at 14; and North Suburban Communications Commission at 15-17.

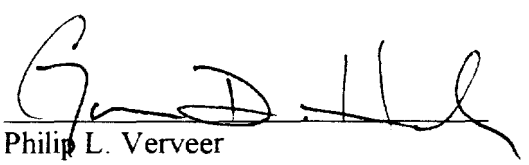
13 Rules re: Microwave TV, Docket Nos. 14895 and 15233, *First Report and Order*, 38 FCC 683 at ¶ 48 (1965).

and substantially delay the time in which consumers can enjoy competitive offerings. Accordingly, the Commission's public interest obligations demand elimination and prevention of municipal regulations that are not authorized by the Communications Act and necessary for the legitimate management of the public rights-of-way.

For the foregoing reasons, Teligent urges the Commission to clarify that the operation of fixed wireless technology to provide telecommunications services cannot be deemed the "use" of the public rights-of-way where the carrier's facilities are located exclusively on private property or where the fixed wireless carrier only leases services or facilities from carriers that do construct, own, or maintain facilities in the public rights-of-way. Moreover, the Commission should confirm that local government attempts to regulate fixed wireless carriers pursuant to right-of-way management authority operates as an entry barrier violative of Section 253(a).

Respectfully submitted,

TELIGENT, INC.

By: 

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Dated: December 13, 1999

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 13th day of December 1999, copies of the foregoing Reply Comments of Teligent, Inc. In Response to the Commission's Notice of Inquiry filed today with the FCC in WT Docket No. 99-217/CC Dkt No. 96-98 were served by hand delivery on the following parties:

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